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11:02 A.M.

(In open court via video conference.)

THE COURT: All right. Good morning, everyone.  
This is Multi District Litigation 21-2998, In Re: Pork  
Antitrust Litigation. We have a status conference today.  
Good morning, everyone.

Heather is going to go through and read the list  
of names so that you are noted for the record. I do that  
that way. It's just a little easier than having everyone  
go through and state their names. If we miss anybody, we  
will have you state your name after Heather is finished.

Go ahead.

COURTROOM DEPUTY: Okay. Starting with  
plaintiffs. Brian Clark.

MR. CLARK: Good morning.

COURTROOM DEPUTY: Joseph Bourne.

MR. BOURNE: Good morning.

COURTROOM DEPUTY: No good mornings. I will get  
through this faster.

Michael Pearson. Amanda Jesteadt. Michael  
Ponzoli. Stephen Owen. Joshua Rissman. Shana Scarlett.  
Blaine Finley. Kyle Bates. Yelena Dewald. Patrick Ahern.  
Jeffrey Bergman. Garth Yearick. Kristin Gore. William  
Blechman. Samuel Randall.

1 Robert Kaplan. David Eddy. Sarah Jones. Scott  
2 Gant. Jack Stern. Liam Phibbs. Daniel Laytin. Jenna  
3 Stupar. Max Samels. Nicholas Ruge. Craig Coleman.  
4 Jessica Nelson. Sami Rashid. Peter Schwingler. Brian  
5 Robison. Christopher Smith. Jarod Taylor. Tiffany  
6 Rohrbaugh.

7 THE COURT: All right. Did we miss anyone who  
8 wishes to be noted today?

9 All right. Very well. Let's start. We have a  
10 list of agenda items here. We will run through them, and  
11 then anything else anyone wishes to raise, that is fine  
12 with the Court as well.

13 We have Judge Docherty here with us, and I will  
14 let him handle the first issue if there are issues  
15 remaining to discuss about depositions.

16 MAGISTRATE JUDGE DOCHERTY: Sure. Good morning,  
17 everybody.

18 The first item on the joint agenda is two  
19 depositions, one of a company called Sioux-Preme, and the  
20 other of a former U. S. Department of Agriculture employee  
21 Courtney Knupp. I hope I'm pronouncing that correctly.

22 Basically the depositions are, the defendants say  
23 that these depositions are relevant, but they were noticed  
24 or subpoenaed within the fact discovery period. It is not  
25 on them that the depositions have not yet taken place.

1           My initial question to either the plaintiffs or  
2           the defendants is, are you looking for a ruling today? Are  
3           you letting us know that a motion to compel may be  
4           forthcoming? What exactly is the ask this morning?

5           MR. BOURNE: Good morning, Your Honor. Joe  
6           Bourne for the Direct Purchaser Plaintiffs and speaking for  
7           the plaintiffs. The plaintiffs would respectfully request  
8           a ruling that either the depositions are untimely and may  
9           not proceed or that the defendants need to file a motion to  
10          modify the scheduling order and seek to show good cause.

11          We believe it's appropriate to rule on the basis  
12          of the orders already in the case and the papers and  
13          discussion here today that the depositions are untimely.

14          MAGISTRATE JUDGE DOCHERTY: All right. And  
15          what's the view of the defendants on this?

16          MS. STUPAR: Hi, Your Honor. Jenna Stupar  
17          appearing here.

18          I think that we are open. As we've stated in our  
19          papers, we think that these depositions can and should be  
20          permitted to proceed. If Your Honor wants to create a  
21          record of that via some sort of an order, that is okay by  
22          us.

23          In our view, we don't need to modify the  
24          scheduling order, although we would be happy to do that if  
25          that's Your Honor's preference. Because these depositions

1 were timely noticed already, in our view, we think that  
2 that covers, is already covered and they can proceed once  
3 all the parties agree on some dates. That said, we're very  
4 open to if Your Honor has a stated preference on how to  
5 proceed.

6 MAGISTRATE JUDGE DOCHERTY: Okay. Just a couple  
7 of questions, Ms. Stupar. I mean, I'm happy to give a  
8 ruling here this morning. My questions center on the  
9 Sioux-Preme deposition.

10 MS. STUPAR: Okay.

11 MAGISTRATE JUDGE DOCHERTY: I notice that you  
12 indicate that the relevance of that deposition was known  
13 November the 18th, but it became more relevant November the  
14 18th when you received the plaintiffs' expert report.

15 When was it that the Sioux-Preme deposition was  
16 noticed?

17 MS. STUPAR: So we initially, so we noticed them  
18 first for structured data, and that occurred in May. They  
19 produced that in July. It was about 700,000 rows of data,  
20 which takes a while to go through especially if you're me  
21 and not great with data, and so then we noticed the  
22 deposition subpoena on September 16. So that's about 45  
23 days before the close of fact discovery.

24 MAGISTRATE JUDGE DOCHERTY: And then I noticed  
25 that you indicate that you were working with Sioux-Preme to



1 limit the scope of the deposition. Could you expand a  
2 little bit more on that, specifically on the timeline of  
3 those discussions, not so much the content.

4 MS. STUPAR: Sure. So we first issued our  
5 notice, as we said, in September 16. Plaintiffs cross  
6 noticed that about ten days later, and then Sioux-Preme  
7 served I think some responses and objections within a  
8 couple of weeks, and we had a handful of phone calls.

9 There were a few in October before the close of  
10 fact discovery, and then those obviously ended up  
11 continuing on as we were trying to negotiate the scope and  
12 the timing with Sioux-Preme.

13 We had initially served twelve topics.  
14 Plaintiffs' cross notice was just an exact mirror of the  
15 twelve topics, and Sioux-Preme because I guess they had  
16 been acquired a couple of years ago, they were trying to  
17 figure out what was reasonable for them in terms of  
18 personnel that they had available, information that they  
19 would have available in order to put a witness up if they  
20 were going to do so at all.

21 And so because they had kind of an acquisition  
22 concern and wanted to know what they had in terms of  
23 personnel, turnover, that kind of thing, they needed to  
24 take some time to figure out internally what was doable for  
25 them and what they were willing to do based on *Bergan*

1 (phonetic).

2 MAGISTRATE JUDGE DOCHERTY: As to both of these,  
3 what is your best estimate as to when the depositions would  
4 actually be taking place if they were to be allowed?

5 MS. STUPAR: With Sioux-Preme we are already in  
6 the end of December, and Sioux-Preme I would assume,  
7 especially given that it's a two-hour deposition, my  
8 thought is we could probably do that in January. Ms. Knupp  
9 is going to be a little bit more difficult just because my  
10 understanding is that the government is still conducting  
11 its *Touhy* analysis.

12 That said, in October they had originally  
13 contemplated some dates in late November that they offered  
14 for Ms. Knupp, and then they said, gosh, this is taking  
15 longer than we expected, we are going to need a little more  
16 time.

17 So it will I guess depend on them. However, it's  
18 been several weeks, and so I'm hopeful, you know, that both  
19 of these could occur in January. Our goal certainly is to  
20 get them done as soon as possible.

21 MAGISTRATE JUDGE DOCHERTY: Thank you.

22 Mr. Bourne, it sounds like in contrast to the  
23 motion we had concerning the JBS 30(b)(6) a little while  
24 ago that these depositions are not taking place because of  
25 facts beyond the control of the party that is seeking the

1 deposition.

2 Why would I not on those facts find, if I need  
3 to, good cause to amend the scheduling order for the  
4 limited purpose of allowing these two depositions?

5 MR. BOURNE: Your Honor, the plaintiffs believe  
6 that good cause is not present because the deadline to  
7 complete fact discovery was October 31st. The deadline to  
8 move, file nondispositive motions was November 14th. We  
9 negotiated extensively a stipulation that described the  
10 parameters of the discovery that would occur after October  
11 31st, and this deposition, these two depositions, were not  
12 part of that.

13 And the defendant could have -- the defendant  
14 group could have acted diligently by either seeking to  
15 include the deposition in the stipulation or by filing a  
16 motion by November 14th.

17 MAGISTRATE JUDGE DOCHERTY: All right. I'm  
18 prepared to make a decision on this, and I don't anticipate  
19 there being a written order to follow, so the transcript of  
20 what I am about to say would be the discovery order for  
21 purposes of either further review or any other purpose  
22 really.

23 Given that these two depositions have been  
24 delayed because of things that are not within the  
25 defendants' control, the government's *Touhy* analysis with

1 the case of the Department of Agriculture deposition of --  
2 I'm sorry -- Ms. Knupp and also the negotiations with  
3 Sioux-Preme, which is a closer question, but all the same,  
4 I am not keen on penalizing a party for seeking to work  
5 with the third party that has been brought into the  
6 litigation by means of a subpoena.

7 And therefore I will find that there is good  
8 cause to amend the pretrial scheduling order, find that the  
9 defendants have been diligent in seeking to advance these  
10 depositions, and as I say, I will allow a very limited  
11 modification of the pretrial scheduling order to allow  
12 these two depositions, one of Sioux-Preme and one of  
13 Ms. Knupp, to take place beyond the close of fact  
14 discovery.

15 I do want to be updated, though. If it looks  
16 like these depositions are not going to occur in January, I  
17 don't know what I would be able to do about that, but I do  
18 want to be informed.

19 And, Ms. Stupar, would you please do that?

20 MS. STUPAR: Yeah, of course, Your Honor. I  
21 appreciate it.

22 THE COURT: Ms. Stupar, do you have any questions  
23 about what I just did or any questions for clarification?

24 MS. STUPAR: Not at all, Your Honor. You were  
25 clear. Thank you.

1 MAGISTRATE JUDGE DOCHERTY: Mr. Bourne, any  
2 requests for clarification?

3 MR. BOURNE: No. Thank you, Your Honor.

4 MAGISTRATE JOHN DOCHERTY: Thank you.

5 THE COURT: All right. Thank you. Let's move  
6 on.

7 The defendants are proposing using an industry  
8 day proceeding, who wishes to speak on this?

9 MR. LAYTIN: It's Dan Laytin from Kirkland &  
10 Ellis for the Clemens Family Corporation. May I proceed?

11 THE COURT: Go ahead.

12 MR. LAYTIN: Thank you, Your Honor.

13 We have three points that we would like to say  
14 with respect to our request for an industry day. The first  
15 is that we are now entering a phase of this litigation  
16 where there are critical motions to be decided by Your  
17 Honor, class certification, *Daubert* motions and summary  
18 judgment, that will require the Court to apply the law to  
19 the facts related to the alleged conduct.

20 In cases like this, the class certification  
21 motion, *Daubert* motion and summary judgment are just  
22 critical to the shaping of this case.

23 The second point is, like many MDLs, the focus of  
24 our hearings together have most often been on the shape of  
25 the table and not what is on the table. Here, what is on

1 the table is important.

2 First in two ways: The first is with respect to  
3 the industries at issue. We sometimes use them  
4 interchangeably, but they are not, when we talk about the  
5 hog industry and the pork industry. The hog industry is  
6 how hogs are born and raised, and then the pork industry is  
7 how those hogs are taken and then processed into pork loin  
8 and then ultimately bacon and et cetera.

9 And how these industries work and interact is  
10 critical to the plaintiffs' allegations of a conspiracy  
11 here which alleges a hog supply conspiracy. Not all the  
12 defendants here are in both industries, and so we believe  
13 that the how, when and why pork processors get their hogs,  
14 how they own them, whether they contract for them, whether  
15 they get them on the spot market is key.

16 The second issue that we think is key is exports.  
17 Plaintiffs claim that defendants used increased exports to  
18 effectuate a conspiracy. "Exports" is a word that  
19 encapsulates a lot of concepts in the pork industry. We  
20 could be talking about the parts of the pig.

21 For example, Your Honor, many parts of the pig  
22 are more often than not destined for the export market,  
23 like ears and feet. We could be talking about the disease  
24 events that impact international demand for pork.

25 These are important industry issues that are not

1 obvious, that are not intuitive and that we have not had  
2 the opportunity to discuss with Your Honor.

3 The third point is, we are open, we defendants,  
4 are open to any procedure to allow us, both parties, to  
5 educate the Court on these important topics. We believe so  
6 strongly that an education day would be helpful, that  
7 whether -- that on any dimension that we put in the papers  
8 we are open to Your Honor's guidance and discussion.

9 For example, we proposed that industry day be off  
10 the record. In the *Blue Cross/Blue Shield* case, that's the  
11 way Judge Proctor did it. He thought that it would  
12 facilitate more open discussion and allow him to ask more  
13 questions, but we are not wedded to that.

14 Other courts have been on the record, and if  
15 that's Your Honor's preference, we're happy to do that.  
16 With respect to the length and timing, we believe that an  
17 industry day would be best suited before Your Honor heard  
18 argument on the motion for class certification.

19 We believe that because we have four hours for  
20 argument, which as plaintiffs noted we think is sufficient  
21 for the argument, but we think that argument could be more  
22 efficient, better focused and result in a more complete  
23 understanding of the issues if it was preceded by a period  
24 of time for us to educate the Court on these important  
25 points.

1           And then with respect to attorney argument or  
2           attorney presentation, that is our, that's our proposal,  
3           but again, we're open. We sort of feel like we're Sam in  
4           "Green Eggs and Ham" not to go all in on the pork  
5           reference, but we are open to any opportunity to discuss  
6           these important issues before Your Honor.

7           So I'll end with that, and I'm happy to address  
8           any questions that Your Honor has or that are responsive to  
9           anything the plaintiffs say.

10          THE COURT: So, Mr. Laytin, you're proposing  
11          basically lawyer discussion, not bringing in experts, to  
12          talk about aspects; is that correct?

13          MR. LAYTIN: That's correct, Your Honor.

14          THE COURT: Okay. All right. Has that been used  
15          in any of these other, like the *Chicken Broiler* or any of  
16          these other cases or not, do you know?

17          MR. LAYTIN: We did not do it in the *Chicken*  
18          *Broiler* case, although there the court had two full days of  
19          argument and testimony on the class certification motion,  
20          so we did not do it there. I'm unaware whether it was done  
21          in other proteins cases.

22          THE COURT: All right. Any other defendant wish  
23          to speak on this?

24          Okay. Who is speaking for the plaintiffs?

25          MR. BOURNE: Good morning, Your Honor. Joe



1 Bourne from Lockridge Grindal Nauen.

2 THE COURT: Good morning, Mr. Bourne, again.

3 MR. BOURNE: The plaintiffs believe this is  
4 unnecessary. The pork industry simply isn't that complex.  
5 As, you know, I think we heard Mr. Laytin say, this is  
6 really about presenting additional argument and attorney  
7 advocacy to the Court in connection with upcoming critical  
8 hearings like class certification and eventually summary  
9 judgment.

10 The plaintiffs believe that argument about the  
11 industry, to the extent that it's necessary, can be  
12 addressed at the hearings on those motions, as well as in  
13 the parties' voluminous briefs and expert reports. A  
14 separate additional day of attorney advocacy about aspects  
15 of the industry that the parties believe strengthen their  
16 claims or defenses is not something that would be helpful  
17 to the Court in our view.

18 It would also --

19 THE COURT: Go ahead.

20 MR. BOURNE: It would also take a lot of the  
21 Court's time and the parties' time and resources to prepare  
22 and conduct this hearing and with the class certification  
23 now coming up in just over a month at the end of January,  
24 the class plaintiffs believe it's important not to delay  
25 that hearing and to proceed full steam ahead.

1           Holding this hearing in early January as the  
2           defendants propose would give the plaintiffs little time to  
3           prepare, and that would be over the holidays, which is not  
4           a good timeline for people to have to put together a  
5           massive amount of work in preparing a day long presentation  
6           like this.

7           THE COURT: So, Mr. Bourne, I understand what the  
8           defendants' counsel would likely do at this proceeding to  
9           discuss aspects of the industry. What would plaintiffs be  
10          presenting if we did something like this?

11          MR. BOURNE: The plaintiffs would anticipate  
12          presenting on whatever topics the parties agreed would be  
13          part of the day. Certainly we think the same ground rules  
14          should apply. So if it's attorney presentation, then it  
15          should be attorney presentation for both sides. Your Honor  
16          already rejected an evidentiary hearing, so we don't  
17          believe there is any need or benefit to calling in experts  
18          to testify.

19          We would anticipate additional topics that we  
20          would propose and seek to include if the industry day went  
21          forward, such as benchmarking and data sharing in the  
22          industry and the impact of the defendant Agri Stats's data  
23          model that is, we allege, has changed fundamentally ways in  
24          which the industry works.

25          But we have not met and conferred about those

1 topics. Thus far the parties have disagreed about whether  
2 an industry day is necessary at all.

3 THE COURT: All right. Any other plaintiffs  
4 lawyer wish to make a comment?

5 MR. BLECHMAN: Yes, Your Honor, William Blechman  
6 from Kenny Nachwalter if I might.

7 THE COURT: Sure.

8 MR. BLECHMAN: Thank you and good morning.

9 Mr. Bourne covered most of the remarks that the  
10 Direct Action Plaintiffs have, but I just wanted to respond  
11 to one or two points presented by defense counsel.

12 I heard defense counsel say to the Court that an  
13 important reason why defendants want this so-called  
14 industry day is because they have had, and I wrote this  
15 down, No opportunity to discuss facts and issues with the  
16 Court that they want to talk about in the industry day.

17 I was struck by the remark, Your Honor, because  
18 as Mr. Bourne notes, almost basically about a month from  
19 now, the Court is going to hear four hours or more on class  
20 cert which presumably are going to raise a number of these  
21 issues, and then there will be summary judgment and other  
22 motions that come out later.

23 So I think there actually has been an  
24 opportunity, to say nothing of the proceedings that Your  
25 Honor has held up until now considering motions to dismiss

1 and the allegations that have been made in the pleadings  
2 and the defendants' response.

3 What's more, speaking just more broadly, Your  
4 Honor, the concern that we have about these kinds of  
5 proceedings is that they typically occur sort of untethered  
6 to motions, and what you have in this case is that you have  
7 pending motions that will make what the defendants want to  
8 cover with the Court duplicative, as best I can tell, in  
9 answering the Court's questions about what would be  
10 presented. Seems like there is a fair amount of  
11 duplication there.

12 Finally, just in the broader sense of things,  
13 Your Honor, as Your Honor knows better than do I, the Court  
14 takes facts presented in evidentiary hearings, in motion  
15 practice, and applies the law, in proceedings where there  
16 is a real accountability for what both parties are saying  
17 with regard to the ultimate Court's determination and  
18 disposition of pending motions.

19 We see no basis to alter that kind of paradigm  
20 that is memorialized in the Federal Rules of Civil  
21 Procedure. Most industry days with which I am familiar,  
22 Your Honor, occur very early in a case involving very  
23 complicated or complex industries or inventions, for  
24 example in patents and things like that.

25 That is not presented here, and Mr. Bourne has

1 already covered that. So I will not belabor the point, but  
2 those were the remarks, Your Honor, I wanted to add. Thank  
3 you.

4 THE COURT: Thank you, Mr. Blechman. Any  
5 plaintiffs' lawyer?

6 Okay. Mr. Laytin.

7 MR. LAYTIN: Just briefly, Your Honor. Thank  
8 you.

9 The plaintiffs' remarks could be distilled down  
10 into, it's not worth it and it's not timely. With respect  
11 to the resources or timing, this is an enormous case that  
12 is, you know, challenges the very basis of multiple  
13 industries, and we think it's worth it if Your Honor agrees  
14 to have a day, some portion of a day reserved for education  
15 of the Court on these critical issues.

16 And we don't believe that complaints about the  
17 resources or timing or delay are well founded in that  
18 context. With regard to Mr. Blechman's comments about this  
19 being essentially too late for an industry day or the  
20 industry is not complex enough, we don't think that's  
21 well-founded, either.

22 Again, Judge Proctor in the *Blue Cross/Blue*  
23 *Shield* case held multiple economics days over the course of  
24 the ten-year period when issues arose. We think that's a  
25 best practice where the Court will be relied on to write

1 opinions that come in the context of an industry that is,  
2 again, not intuitive.

3 There are 40 some lawyers on this Zoom. I don't  
4 believe any of us understood the intricacies and the  
5 underlying market economics behind how the sausage is made,  
6 quite literally.

7 We think taking some portion of a day to educate  
8 Your Honor in a way that will make it, future arguments  
9 more pointed, more efficient and more helpful we think is,  
10 there is no down side. And the final point is, it is  
11 curious to us that the plaintiffs don't want the  
12 opportunity to educate the Court on these important topics.

13 We don't see a real down side to taking several  
14 hours and talking about the facts that are relevant to the  
15 industries in this important case. Thank you.

16 MR. BLECHMAN: Your Honor, may I respond just  
17 briefly?

18 THE COURT: You may, Mr. Blechman.

19 MR. BLECHMAN: I'm in the *Blue Cross* case, as is  
20 Mr. Laytin. I would like to think that Mr. Laytin and I  
21 will agree that this case is not the *Blue Cross* case in  
22 terms of the economics and the facts and the nuances and  
23 the scale that is presented.

24 This case is a commodity case, and Your Honor  
25 asked about the *Broiler Chicken* case. There was not an

1 industry case there. We don't think it's necessary here at  
2 all.

3 And final point, Your Honor, is this: With  
4 regard to educating the Court, the reason that we oppose  
5 this industry day is because we regard it as our charge,  
6 our responsibility to the Court, to educate the Court about  
7 these kinds of issues through the vehicle of motion  
8 practice and responding to motions, in writing motions and  
9 memoranda.

10 That's what we view as our charge. I acknowledge  
11 to Your Honor that it is, it is the strategy of defendants  
12 often to try to present something as more complicated, and  
13 I acknowledge to you that it's the strategy of plaintiffs  
14 at times to try to simplify, but in this case we're dealing  
15 with a commodity product.

16 You have some indication of how this might go  
17 because it wasn't done in the *Broiler Chicken* case, and the  
18 Court is about to be educated considerably more about these  
19 issues in its consideration of motions that are already  
20 pending.

21 Thank you.

22 MR. BOURNE: Your Honor?

23 THE COURT: Yes, Mr. Bourne.

24 MR. BOURNE: Really briefly. The class  
25 plaintiffs believe that the relevant aspects of the

1 industry will be sufficiently addressed and discussed at  
2 the class certification hearing.

3 We would also suggest that to the extent the  
4 Court is considering this and has questions about the  
5 usefulness of an industry day that we could see how the  
6 class certification hearing goes, and if the Court believes  
7 that additional education such as the defendants have  
8 proposed would be helpful, we could revisit it at that  
9 point.

10 THE COURT: All right. Any final word on this,  
11 Mr. Laytin?

12 MR. LAYTIN: Only that to talk about these  
13 products as commodities again conflates the multiple  
14 industries at issue. There is the hog industry, but no one  
15 is going to say when they bring home bacon and they are  
16 told they got the wrong one, whether it's hickory smoked or  
17 some other thing, that everything in this industry is a  
18 commodity.

19 And it's exactly these points, what is a hog,  
20 what is a pork product, what is a value added product, that  
21 we think would benefit from the light of day. Thank you.

22 THE COURT: All right. Thank you for your  
23 arguments on this, and I think although an industry day  
24 might be interesting, I don't think it's particularly  
25 necessary at this stage of this case.



1           However, I'm not going to hold an industry day  
2           per se, but I'm prepared to add one additional hour to each  
3           side's time on the class certification motion for the  
4           purpose of adding what I might say are educational elements  
5           to that hearing so that the Court has the benefit of some  
6           additional thoughts from an educational standpoint, but I  
7           don't think we need to do a separate day for an industry  
8           day.

9           So we will move that to a period of six hours  
10          rather than four for the class certification hearing, and  
11          please feel free to be educational as part of your  
12          arguments if you wish to do that.

13          All right?

14          MR. LAYTIN: Thank you, Your Honor.

15          THE COURT: Okay. Let's proceed to the next  
16          issue, which I think is, maybe there is nothing to be done  
17          at this point in time, but schedule for authenticity and  
18          admissibility of potential trial exhibits, is there any  
19          report on this?

20          I think this is still maturing.

21          MR. BOURNE: Joe Bourne here, Your Honor.

22          This is still maturing. We have been working on  
23          meeting and conferring for the last couple months with  
24          defendants, and we anticipate having hopefully another  
25          update or potentially being able to file a stipulation or

1 something to that effect before the January status  
2 conference.

3 THE COURT: All right. That sounds good.

4 Let's move on to the Seaboard issue. I think,  
5 Judge Docherty, are you going to handle this?

6 MAGISTRATE JUDGE DOCHERTY: I could. It didn't  
7 look from the papers that there was anything to handle. It  
8 looked like Seaboard had spun off Daily's Premium Meats,  
9 that the structured data that was kept by Daily's Premium,  
10 the parties have met and conferred and have agreed on that.

11 But is there more to say, other than what was in  
12 the joint agenda? Any plaintiffs' lawyer who wishes to  
13 speak to that?

14 MR. OWEN: Yes, Your Honor. Good morning. My  
15 name is Steve Owen of the law firm Lockridge Grindal Nauen  
16 on behalf of the Direct Purchaser Plaintiffs.

17 Just to add, a part of those meet and confer  
18 efforts and Seaboard's production of daily structured data  
19 from after the spin-off period was that DPPs raised several  
20 questions specific to the structured data and raised  
21 specific points for clarification that the DPPs wanted  
22 clarified.

23 To date, Seaboard has not provided answers to  
24 those questions. However, as of yesterday afternoon,  
25 Seaboard represented to the DPPs that they would provide

1       answers to those questions shortly after the new year. So  
2       that is just an update with respect to that issue.

3               MAGISTRATE JUDGE DOCHERTY: All right. Well, I  
4       appreciate being brought up to speed on that.

5               Any other plaintiffs' lawyer that wants to speak  
6       to the spin-off of Daily's from Seaboard? Any defense  
7       lawyer that wants to be heard on this?

8               MR. SCHWINGLER: Peter Schwingler for Seaboard.  
9       I've got nothing to add, Your Honor.

10              MAGISTRATE JUDGE DOCHERTY: Okay. All right.  
11      Thanks very much, and if there is something to be decided,  
12      it looks like it would be in January and not now. Okay.

13              MR. OWEN: Thank you.

14              MAGISTRATE JUDGE DOCHERTY: Thank you both.

15              THE COURT: All right. Why don't you, Judge  
16      Docherty, you can tee up the letter rogatory issue here  
17      that is pending.

18              MAGISTRATE JUDGE DOCHERTY: Yes. I just had a  
19      question about that. There was an indication that a,  
20      something called a long chambers day had been requested. I  
21      assume, because I've never heard that term before, but I  
22      don't know every term, that this is happening in Canada and  
23      isn't something that we need to be concerned with, other  
24      than knowing generally what's going on.

25              Ms. Scarlett, is that correct?

1 MS. SCARLETT: Yes, Your Honor. Shana Scarlett  
2 on behalf of the plaintiffs.

3 What has happened is that Tyson has retained  
4 counsel on behalf of the witness, and Mr. Taylor could  
5 speak for Tyson, but I believe they intend to challenge the  
6 order. They have requested a two-day hearing at this point  
7 I think in front of the Canadian court, which will happen  
8 around February 10th.

9 But perhaps Mr. Taylor has a little bit more  
10 inside information since Tyson has not yet filed its  
11 responsive papers with the Court.

12 MAGISTRATE JUDGE DOCHERTY: Just to be clear, as  
13 far as you know, there is nothing in the U. S. court  
14 concerning Mr. Matsumoto's deposition now that the letters  
15 rogatory are out the door.

16 MS. SCARLETT: Nothing that I'm aware of, Your  
17 Honor.

18 MAGISTRATE JUDGE DOCHERTY: Mr. Taylor, is there  
19 anything more to say about Mr. Matsumoto's deposition?

20 MR. TAYLOR: As Ms. Scarlett noted, he has a  
21 hearing scheduled for February 10th, and my understanding  
22 is, there is nothing for this Court to do pending the  
23 outcome of that hearing.

24 MAGISTRATE JUDGE DOCHERTY: Thank you both for  
25 clearing that up. I appreciate it.

1 MS. SCARLETT: Thank you, Your Honor.

2 THE COURT: All right. Very well. The  
3 consolidated amended complaint was filed by the Direct  
4 Action Plaintiffs. I noted that on the docket. The only  
5 issue here is, Triumph is going to file a motion for  
6 summary judgment; is that correct?

7 MR. SMITH: Yes, Your Honor. We intend to file a  
8 motion for leave to move for summary judgment on the DAP  
9 consolidated complaint.

10 THE COURT: Okay. And so the motion for leave  
11 will be filed soon; is that correct?

12 MR. SMITH: Yes. Our intention is to file that  
13 motion for leave with the proposed motion for early summary  
14 judgment with the January 20th response date.

15 THE COURT: All right. Go ahead. Sorry.

16 MR. SMITH: I apologize, Your Honor. That's our  
17 deadline to respond to the DAP consolidated complaint.

18 THE COURT: All right. Anyone else wish to speak  
19 on this?

20 MR. KAPLAN: Robert Kaplan.

21 THE COURT: Go ahead, Mr. Kaplan.

22 MR. KAPLAN: Number one, there has been no meet  
23 and confer. We filed the complaint on December 5th, so I'm  
24 not sure exactly what they are proposing to file.

25 Secondly, Judge Docherty entered a scheduling

1 order on December 1st. That's docket 1651. That has a  
2 schedule for expert reports. Expert reports are due June  
3 5, 2023. There is a schedule. Dispositive motions are not  
4 due until May 17, 2024.

5 Our experts are relevant to summary judgment. We  
6 will be using expert opinions to oppose summary judgment.  
7 So I would suggest, Your Honor, this is premature. We  
8 would file something.

9 Like I said, I don't know what they're moving on,  
10 but most likely we will be opposing it on the grounds that  
11 it's premature and that we haven't had expert reports or  
12 expert discovery.

13 MR. SMITH: If I could just respond briefly?

14 THE COURT: Go ahead, Mr. Smith.

15 MR. SMITH: I think a little bit of color might  
16 be helpful. If you recall, this is an issue that we  
17 flagged in the October status report. With respect to  
18 Triumph, I think it's a very simple motion for summary  
19 judgment.

20 If Your Honor will recall in addressing the  
21 second motion to dismiss, the Court relied, and plaintiffs  
22 pressed, allegations that -- of parallel conduct in the  
23 reduction of sow herds.

24 For defendant Indiana Packers, there were no such  
25 allegations, so Indiana Packers was dismissed. For others,

1 like my client Triumph Foods, there were allegations that  
2 we made sow herd reductions at particular facilities, and  
3 the Court relied on that in denying the motions to dismiss.

4 Your Honor, respectfully those allegations  
5 weren't true when they were made. Now that fact discovery  
6 is closed, they are demonstrably false. When the DAPs  
7 filed their consolidated amended complaint, they recognized  
8 this, and they have conceded that Triumph Foods never had  
9 any live operations and had no sows.

10 Respectfully, if we had no sow operations, we  
11 couldn't review sows that we didn't have. Triumph is  
12 unique in the sense that it's solely a pork processor. We  
13 have no power over hogs to buy, and after processing pork,  
14 Triumph's role in the supply chain ends because Triumph  
15 doesn't even price or sell the products that it processes  
16 at its facility in St. Joe.

17 Again, discovery is closed. There is no evidence  
18 of any agreement, no evidence of parallel conduct as to  
19 Triumph, no evidence that Triumph reduced supply. We  
20 shouldn't have been in this case to begin with, but DAPs  
21 filing an amended complaint after the close of fact  
22 discovery and continuing to press these allegations, we  
23 believe that the time to resolve that is now.

24 It is a simple motion. It is an expensive case  
25 for my client, and we would just simply like an opportunity

1 to present to the Court why that makes sense and why it  
2 makes sense now, and they will be free to respond to our  
3 motion for leave, but again we think this is a very simple  
4 motion.

5 And if there is no evidence to support any of the  
6 core allegations, respectfully there is nothing that an  
7 expert could opine on.

8 MR. KAPLAN: Your Honor, the core allegations  
9 here also involve a conspiracy to limit slaughter to keep  
10 their fair share of the slaughter market. Triumph is  
11 involved in the slaughter market.

12 Triumph is a processor of harvesting the hogs to  
13 create the pork, and that's the core allegation of our  
14 complaint, and Triumph is right in the middle of it.

15 THE COURT: All right. Well, thank you. The  
16 Court will review the motion that Triumph intends to bring,  
17 together with the response, and will issue an order quickly  
18 on whether the motion can be brought now.

19 MR. SMITH: Thank you, Your Honor.

20 THE COURT: All right. Okay. Briefing on class  
21 certification, do we have any issues here to discuss?

22 MR. LAYTIN: Your Honor, it's Dan Laytin for  
23 Clemmens Family Corporation. I think we're in the previous  
24 section of our status conference. This also is a preview  
25 of coming attractions that we are not asking for any action



1 today, but we will similarly be seeking leave to file a  
2 surreply in opposition to class certification.

3 And in brief, the issue is that plaintiffs' class  
4 reply for the first time really changed their theory of the  
5 case from the one that Mr. Smith just articulated that was  
6 really based on a conspiracy to reduce hog production, and  
7 that has decreased the number of sows that each hog  
8 producer has and decreased the hogs that were processed.

9 As Mr. Smith said, that is the basis on which  
10 Your Honor decided the two motions to dismiss because the  
11 primary alleged vehicle of the conspiracy was sow and hog  
12 reduction. Plaintiffs' original class papers proceeded  
13 with that theory in mind.

14 They allege that defendants controlled the hog  
15 supply, and they therefore in their regression controlled  
16 for the cost of raising hogs but not buying hogs because,  
17 again, the plaintiffs' view of the world was that  
18 defendants controlled and owned the hog supply.

19 The problem for plaintiffs, as defendants pointed  
20 out in their class opposition, is that defendants don't own  
21 the hog supply, and independent hog producers do instead;  
22 and therefore packers benefit from increased hog supply,  
23 not less because they of course can buy hogs for cheaper.

24 When you include the price of hogs in the  
25 regressions that plaintiffs' experts offered, the

1 overcharge falls away. So the problem we have is that  
2 plaintiffs have shifted to a new theory on reply, and just  
3 to quote CIIPPS' experts, Plaintiffs do not allege a  
4 conspiracy to restrict hog production.

5 That is an about-face, and it's not just the  
6 CIIPPS' expert Williams. The DPPs' expert Mangum and  
7 CIPPs' expert Singer all say similar things. That is an  
8 about-face that has real big implications, and it has  
9 implications for class and for *Daubert* and for summary  
10 judgment.

11 But because it comes so late and these  
12 declarations by plaintiffs' experts come so late in the  
13 class process, we believe that we need an opportunity to  
14 file a short surreply on the opposition to class to address  
15 these new arguments and these new declarations and  
16 allegations.

17 And so we will shortly be filing a motion for  
18 leave to do just that, and we would propose to do it in the  
19 6,000 remaining words that we have that were allocated to  
20 us for the class briefing.

21 THE COURT: When are you filing your motion,  
22 Mr. Laytin?

23 MR. LAYTIN: We could do it on whatever schedule  
24 the Court would like. We could do it expeditiously within  
25 a week.

1 THE COURT: All right. That sounds good. Why  
2 don't you do it within a week?

3 Anyone, plaintiffs, wish to speak on this?

4 MR. CLARK: Brian Clark speaking on behalf of the  
5 class plaintiffs.

6 We have some issues with this proposal. The  
7 first time we heard about this possibility of a surrebuttal  
8 report was on Thursday, December 15th, the day before the  
9 status report was due and in one of the very final  
10 exchanges of the draft of that status report before the  
11 parties. Our reply expert reports were filed November  
12 18th.

13 Defendants have not even requested a meet and  
14 confer yet, and we were not provided until in the last  
15 three minutes any purported basis for a surrebuttal report,  
16 and any motion for leave would not be fully briefed until  
17 at most a few weeks before the hearing. We have the  
18 holidays here.

19 We have not waited to file such a motion. It  
20 could have even been filed last week if the defendants had  
21 bothered to request a meet and confer, but it seems to us  
22 in light of this, and Mr. Laytin described it as a preview,  
23 it seems like defendants are taking the Court's temperature  
24 on this issue before even meeting and conferring or filing  
25 a motion.

1 And plaintiffs' suggestion, as the Court  
2 suggested, that the temperature is quite cold in  
3 Minneapolis on this issue today. Big picture: These are  
4 class plaintiffs' motions. We should have the last word.  
5 That is the way motions work.

6 In addition, this briefing schedule and structure  
7 that has been in place for almost two years since January  
8 2021, it's the result of a long-established and agreed upon  
9 schedule and structure.

10 And the Court, as it always does, received an  
11 initial brief, an opposition brief and a reply brief and  
12 accompanying reports. But to add an entirely new round of  
13 briefing here, and it will be a round because if defendants  
14 file a surreply, plaintiffs are entitled to respond to it  
15 with a sur-surrebuttal report from our experts.

16 And to do this at the 11th hour at the January  
17 31st class certification hearing we just don't think is  
18 fair. These reports were proper rebuttal. I mean this is  
19 the first time we have heard this argument from defendants  
20 in the last five minutes now on what the exact issue is,  
21 but our conspiracy has always been the same.

22 What defendants are really saying here is, they  
23 have defined our conspiracy in a way they view as about  
24 hogs, reducing hog supply. That's not our conspiracy.  
25 That's the way they framed it, and the purpose of this

1 surrebuttal is for them to continue framing a conspiracy  
2 that they cannot found, that we have not alleged.

3 The hearing on the motions is weeks away with the  
4 holidays intervening. It's prejudicial to even have to go  
5 through this exercise on briefing of their request for a  
6 surrebuttal. I will just note the defendants have declined  
7 to depose all but one class expert regarding their reply  
8 reports. Our concern is, defendants are anticipating a  
9 sur-surreply report from plaintiffs in response, and then  
10 the depositions of plaintiffs' experts will happen after  
11 that.

12 But at some point this briefing has to end.  
13 Somebody has to have the last word, and we suggest the  
14 typical end of briefing with the reply report is the  
15 appropriate place to do it. I will just kind of note the  
16 experience of when this happened before.

17 Defendants in *Broilers* made the same request.  
18 Different facts, same result. There is something new, we  
19 need a surrebuttal. They filed their motion for leave to  
20 file the surrebuttal report, and attached to that motion  
21 was the actual surrebuttal expert report.

22 And of course if defendants do that, we are going  
23 to have to file an opposition, and we will also want to  
24 attach our sur-surrebuttal expert report, and at that point  
25 we are millions of dollars down the road in a case that, as

1 was pointed out, is expensive.

2 We don't think that is a wise use of resources  
3 over the holidays. I think we should be focused on  
4 educating and preparing the Court at the January 31st  
5 hearing. Defendants have every opportunity to make these  
6 arguments on how they would like to say we have defined our  
7 conspiracy. We disagree.

8 And we will tell you about that on January 31st,  
9 but to spend the holidays going through this exercise again  
10 with defendants we don't think is a wise use of resources,  
11 and we would ask the Court since the preview has been made  
12 to confirm that briefing is closed and avoid this exercise  
13 over the holidays.

14 THE COURT: Mr. Laytin, is there a planned  
15 surrebuttal expert report?

16 MR. LAYTIN: No, Your Honor. No.

17 THE COURT: All right. Well, I don't have a  
18 problem with a very short surrebuttal brief, and I will  
19 permit that if you could get that in within a week and then  
20 the plaintiffs' reply a week after that. Keep these short.

21 I don't think that additional expert reports are  
22 necessary, but if you want to make any additional argument  
23 I'm fine with that, and the plaintiffs have a week to  
24 reply.

25 All right?

1 MR. LAYTIN: Thank you, Your Honor.

2 MR. SMITH: Just in the nature of a five page,  
3 five pages for plaintiffs, five pages for defendants,  
4 something short or --

5 THE COURT: Yes. Yes. Five pages is sufficient.

6 All right. And then I would just note for the  
7 record that we received the Direct Action Plaintiffs'  
8 objection to Judge Docherty's November 16th order on a  
9 motion to compel. We will be looking at that right away.

10 All right. Anything else anyone wishes to  
11 address today?

12 All right. We will adjourn and for those in the  
13 Beef matter, we will return in about ten minutes to begin  
14 that hearing, and I hope everyone has a lovely holiday  
15 season.

16 And we have another, do we have another status  
17 conference scheduled at this point, Heather?

18 COURTROOM DEPUTY: We don't, Your Honor.

19 THE COURT: Do we have some dates we are looking  
20 at? I think I would like to do a separate status  
21 conference separate from the class certification motion,  
22 earlier probably.

23 COURTROOM DEPUTY: Earlier than the motion?

24 THE COURT: Yeah.

25 COURTROOM DEPUTY: The week before, how about on

1 January 26th?

2 MR. KAPLAN: Your Honor?

3 THE COURT: Yes. Go ahead, Mr. Kaplan.

4 MR. KAPLAN: There is a multi district panel  
5 hearing on that day that some of us will be --

6 THE COURT: All right. That's not a good day.  
7 How about earlier? We may have to take some time off from  
8 trial.

9 COURTROOM DEPUTY: Tuesday the 24th?

10 MR. KAPLAN: That's fine.

11 THE COURT: Tuesday the 24th work? We would  
12 probably set afternoon time since we anticipate being in  
13 trial, but we would move it earlier if the trial goes away.

14 COURTROOM DEPUTY: How about three o'clock?

15 THE COURT: Three o'clock Central Time.

16 MR. SMITH: Your Honor, for class plaintiffs,  
17 that works. Thank you.

18 THE COURT: All right. Let's plan it for 3:00  
19 p.m. Central Standard Time on January 24th.

20 MAGISTRATE JUDGE DOCHERTY: Judge, I'm on  
21 criminal duty then, but I can make that happen. Initial  
22 appearances are usually earlier in the afternoon.

23 THE COURT: Okay. Well, we will issue an order  
24 pausing criminal duty matters for an hour.

25 All right. Have a good holiday, everyone. Thank



1       you all for participating by video conference today. We  
2       will see you next month.

3               MR. KAPLAN: Thank you, Your Honor.

4               MR. LAYTIN: Thank you.

5               MR. BOURNE: Thank you.

6                       **(Court was adjourned.)**

7                               \*               \*               \*

8               I, Kristine Mousseau, certify that the foregoing  
9       is a correct transcript from the record of proceedings in  
10      the above-entitled matter.

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14              Certified by: s/ Kristine Mousseau, CRR-RPR  
15                                      Kristine Mousseau, CRR-RPR  
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